CASE NO. 90-994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

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LEWIS & COMPANY, LAWYERS,
L. BURKE LEWIS, AMY J. CASSEDY,

Petitioners

vs.

KONSTANTIN THOEREN, PATROLA FILMS, INC., PATROLA, G.m.b.H., ADRIANA INTERNATIONAL CORPORATION, HANS A.-KUNZ, KEMAL ZEINAL-ZADE, ANTHONY M. MIDGEN, ARIAN FILMS PRODUCTIONS, LTD., ARTHUR L. MARTIN,

Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioners

Of Counsel:
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QUESTIONS PRESENTED

1. May a district judge, within the confines of Article III of the U.S. Constitution, 28 U.S.C. §§144 and 455, and the Magistrates Act, 28 U.S.C. §631 et seq., deputize a long-time friend to serve as a surrogate judicial officer without provision for a formal record, conformance with Federal Rules of Civil Procedure, or Article III review, and to be paid by the litigants at the annual rate of approximately $750,000 on pain of contempt?

2. What is the obligation of a U.S. Court of Appeals to carry out the mandate of this court relative to counsel's duty to disclose a party's attempted perpetuation on appeal of false testimony, sham issues, and sham pleadings?

3. Did the U.S. Court of Appeals for the Ninth Circuit appropriately sanction petitioners for the opening

appellate briefs filed on behalf of appellants below?

4. Did the U.S. Court of Appeals for the Ninth Circuit appropriately affirm awards of sanctions and a finding of contempt against petitioners?

5. Did the U.S. Court of Appeals for the Ninth Circuit properly deem petitioners' petition for rehearing and suggestion for hearing en banc as untimely?

6. May counsel against whom sanctions are imposed by a district court be deprived of opportunity for immediate appeal, consistent with the due proces clause of the U.S. Constitution?

LIST OF PARTIES

All parties to the judgment sought to be reviewed are set forth in the caption. Counsel is informed and believes that Arthur L. Martin has no interest in the outcome of the petition.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LEWIS & COMPANY, LAWYERS, ET AL.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

****

Petitioners L. Burke Lewis, Amy J. Cassedy, and Lewis & Company, Lawyers (collectively "LEWIS & COMPANY") respectfully request that a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit entered Monday, September 10, 1990 and for which petitioners' petition for rehearing and suggestion for hearing en banc, filed Monday, September 24, 1990, was denied as untimely by order dated

November 16, 1990.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 913 F.2d 1406 (9th Cir. 1990), and is reprinted in the appendix hereto ("App.") at App. I. That opinion considered certain orders and opinions of the U.S. District Court for the Central District of California. Those orders and opinions are unreported and are reprinted in the appendix hereto. Additionally, the Ninth Circuit issued an order dated November 16, 1990 denying as purportedly untimely LEWIS & COMPANY's petition for rehearing and suggestion for hearing en banc. Such order is unreported and is reprinted in the appendix hereto. Also at issue are certain unreported orders of the Ninth Circuit dated August 29, 1989, January 30, 1990, March 2, 1990, April 2, 1990, April 9, 1990, and May 16, 1990. Such orders are reprinted in the appendix.

JURISDICTION

The opinion of the U.S. Court of Appeals for the Ninth Circuit was entered on September 10, 1990. On September 24, 1990, LEWIS & COMPANY and other appellants timely and separately filed petitions for rehearing; however, the Ninth Circuit deemed such petitions untimely by order dated November 16, 1990. See discussion, infra. This court's jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional provisions, statutes, and rules involved in the case include: U.S. Const. Art. III §1; U.S. Const. amend. V; U.S. Const. amend. XIV §1; 28 U.S.C. §144; 28 U.S.C. §455; 28 U.S.C. §631; 28 U.S.C. §634; 28 U.S.C. §636; 28 U.S.C. §1927; Fed. R.App. P. 38; Fed. R.Civ. P. 11; Fed. R.Civ. P. 26(g); Fed. R.Civ. P. 53; and Central District Local Rule 25.10. Because of the length of such provisions, their pertinent text is set

forth in the appendix hereto.

STATEMENT OF THE CASE

A. The Crux of this Case

While the questions presented by this petition are as set forth above, this is in fact the court of last resort: careers and lives are at stake. The real issue here is corruption in the largest federal judicial district in the United States and its Chief Judge, and likewise the insidious attempts by the Ninth Circuit to cover up that corruption. It is not often, and, it is hoped, it has never happened before, that a published opinion of a U.S. Court of Appeals would have 75 misrepresentations of facts, basic law, and the record.[1] That opinion would have the members of this court and the public believe that petitioners are incompetent

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[1] The nature and space limitations of this petition prevent a full listing of each of the 75 or more misrepresentations; during full briefing, LEWIS & COMPANY can and will, provide such a listing.

lawyers who failed to follow the instructions, rules, and orders of the district court or the Ninth Circuit. Nowhere, however, does the Ninth Circuit's opinion, couched in conclusory language, specify any purported misconduct by petitioners; nowhere was there even a motion in the district court which specified purported misconduct. The purpose of such intellectual dishonesty is to undermine petitioners' credibility in bringing to public attention the uncontested facts evidencing the corrupt practice in the Central District of California.[2]

The corrupt practice about which petitioners complain and for which they have been made to suffer such devastating consequences is one where the Hon. Manuel L. Real, Chief Judge of the Central District of California, has for the last

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[2] The decision reads as if the court did not read the opening briefs. Petitioners have attached those opening briefs in their original form as a supplemental appendix.

13 years appointed his long-time friend, John Francis Carroll, outside the confines of the U.S. Constitution, statute, or federal rules, to serve as a surrogate judicial officer, exercising Judge Real's federal judicial authority, for which litigants are made to pay Mr. Carroll's salary, on pain of contempt, at the annual rate of approximately $750,000, including compensation for Mr. Carroll's support staff and associate/daughter. Through this practice, approximately $10 million has changed hands, although neither Judge Real nor Mr. Carroll will formally disclose the extent of the practice; record-keeping practices of the courthouse render irretrievable such information.

Petitioners' complaints do not exist in a vacuum: the FBI has commenced an investigation at the request of a federal appellate judge to the very highest levels of that agency. That investigation is

ongoing, although there already appears to have been one homicide resulting from attempts by lawyers to expose corruption in federal courthouses in California.[3]

Since petitioners have raised, their professional and personal lives have been shattered: it is not enough their own physical safety has been put in jeopardy, but the causes of their clients, unrelated to this case, where the law is clearly in their favor, have suddenly been decided adverse to them, notwithstanding prior preliminary orders in their favor.[4]

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[3] At least one FBI agent, as well as police Capt. Steve Willis, in charge of the homicide investigation, stated off the record to counsel that corruption in federal courthouses in California is systemic and pervasive.

[4] But one example of at least half a dozen, in an entirely unrelated case in state court in which LEWIS & COMPANY represents clients entirely unrelated to Adriana and the third party defendants, opposing counsel presented documents filed with the Ninth Circuit relative to the issue of substitution of counsel to a Los Angeles Superior Court Judge who, in open court, stated (a) that Mr. Lewis (who was not then present and had never before appeared before that judge), was the "kind of lawyer" who had a "propensity" to seek the disqualifi-

This court and the Chief Justice are the ultimate custodians of integrity of the U.S. courts. If this court does not act now, at least two careers are over -- of lawyers who have acted competently, with courage and with dignity. In their stead will remain a federal judge who believes his office is personal to him, to be sold or bartered for benefit of friends, and other judges, who, for whatever reason, are protecting such judge and his corrupt practice.

B. Facts and Procedural History Below

This action involved a corporate dispute between Adriana International Corporation ("Adriana"), formed to produce

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cation of judges, and (b) that LEWIS & COMPANY lacked "credibility" and committed an unethical act in this action by disclosing to the Ninth Circuit the fact of Adriana's attempt to perpetuate false testimony, notwithstanding counsel's obligations mandated by this court. See discussion, infra. The state court, based upon an adverse determination of LEWIS & COMPANY's credibility, ruled against LEWIS & COMPANY's unrelated clients on an outcome determinative issue.

and distribute motion pictures, and its related parties on the one hand and Konstantin Thoeren, Adriana's first president, and his wholly owned companies (collectively "Thoeren"), on the other.

What should have been a relatively simple corporate dispute[5] became procedurally complex and constitutionally threatening when the assigned trial judge, the Hon. Manuel L. Real, inter alia: (a) enforced, sua sponte, with no motion pending, and on approximately one hour's

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[5] The underlying complaint, filed by LEWIS & COMPANY on behalf of Adriana, following an audit of Adriana's books and records performed at the request of LEWIS & COMPANY, alleged that Thoeren had breached contractual and fiducial duties. The complaint set forth a claim for copyright infringement pursuant to 17 U.S.C. §501 et seq., providing the district court subject matter jurisdiction pursuant to 28 U.S.C. §1331. Thoeren filed a counterclaim against Adriana, naming as third party defendants Kemal Zeinal-Zade ("Zade"), as financier of Adriana, Hans-A. Kunz ("Kunz"), a business partner of Zade, Anthony M. Midgen ("Midgen"), British solicitor to Zade, Kunz, and Adriana, and Arian Films Productions, Ltd., ("AFP"), shareholder of Adriana. LEWIS & COMPANY represented Adriana and the third party defendants.

notice, an unsigned discovery request by Thoeren directed to Adriana, contrary to the express provisions of Fed. R.Civ. P. 26(g), and (b) appointed John Francis Carroll, a local lawyer and long-time friend, as denominated "master", under the purported authority of a local rule, to oversee and make evidentiary rulings "without motion", and to be paid by the litigants at the annual rate of approximately $750,000, including compensation for secretaries, paralegals, and Mr. Carroll's associate/daughter.

When, at the direction of Judge Real, Mr. Carroll made an unsolicited, ex parte, and extrajudicial overture to LEWIS & COMPANY, Adriana, through LEWIS & COMPANY, moved for Judge Real's recusal pursuant to 28 U.S.C. §144 and to vacate the reference to the "master". Both such motions were denied; a petition for writ of mandamus to the Ninth Circuit was unsuccessful.

As a result of a series of actions by

Mr. Carroll, largely without benefit of a record and based upon ex parte and extra-judicial communications between Judge Real and Mr. Carroll, Judge Real, sua sponte, ordered Kunz and Zade, both Swiss nationals, to appear at a specified date and time for deposition. An emergency request for stay to the Ninth Circuit was unsuccessful. Neither Kunz nor Zade appeared.

Kunz subsequently presented declaration testimony that he was unable to appear at the ordered date and time because he was to meet with officials of certain African governments. Zade presented declaration testimony he was unable for health reasons to travel to the United States to appear at the ordered date and time.

Nonetheless, the district court not only struck the answers of Kunz and Zade, but also struck the answers of Midgen and Adriana, dismissed Adriana's complaint, and entered default against Adriana and

each third party defendant. Following a hearing at which Adriana and the third party defendants were not permitted to present evidence, and over objections that the district court had no subject matter jurisdiction over the third party complaint, the district court entered default judgment against Adriana, Zade and Kunz for approximately $8 million, as well as ordering 30% of Adriana's stock transferred to Thoeren. The judgment was amended, without notice or opportunity to be heard, to include Midgen in the multi-million dollar judgment, to order AFP to turn over 30% of both its stock and Adriana's stock, and to award an additional $30,000 damages against Zade. Adriana and the third party defendants moved for reconsideration of that amendment to the judgment; the district court imposed sanctions against LEWIS & COMPANY, Adriana and the third party defendants for so moving.

Additionally, the district court, early in the proceedings, imposed sanctions against LEWIS & COMPANY and Adriana (a) for moving to disqualify counsel for Thoeren on the basis of evidence that such counsel had previously acted as counsel for Adriana on a subject of controversy in the instant litigation, (b) for unspecified "discovery" conduct, and (c) for refusing to sign, pursuant to Fed. R.Civ. P. 11, a joint document required by local rule, prepared by counsel for Thoeren, and containing false and prejudicial statements. The district court held LEWIS & COMPANY in contempt for the purported failure to pay such sanctions "forthwith", although (a) Thoeren delayed preparation of proposed written orders, as directed by the district court, (b) Thoeren sought to enforce the orders before they were final, (c) Mr. Lewis was, at the time, in the hospital and/or recovering from surgery, CR 65, (d) the sanctions were in fact paid

by Adriana and (e) no motion for contempt was at any time pending because of Thoeren's failure to comply with local filing requirements.

A timely notice of appeal to the U.S. Court of Appeals for the Ninth Circuit was filed; LEWIS & COMPANY prepared and filed opening briefs on behalf of Adriana, Zade, Kunz, Midgen, AFP, and LEWIS & COMPANY with the specific, page-by-page, line-by-line approval of and following months of regular and detailed discussions with the individual appellants (including Midgen, a solicitor), and a local Adriana officer. By order dated August 29, 1989, App. XI, the Ninth Circuit rejected a motion by Thoeren to strike the opening briefs based upon, inter alia, objections to the spacing and format of such briefs.

During or about August and September, 1989, subsequent to the filing of the opening briefs, despite significant pre-filing investigation and exhaustive prepa-

ration during the district court and appellate proceedings, LEWIS & COMPANY learned or came to believe (a) the declaration submitted by Kunz to excuse his failure to appear for deposition was almost certainly false,[6] (b) Zade's testimony as to his ill health to excuse his nonappearance for deposition was likewise extremely suspect, (c) allegations in the third party complaint relative to Zade's actual control of the other individual and corporate parties, despite prior denials, were true and correct, and (d) allegations central to the complaint were and are unfounded.

Although until the time of LEWIS & COMPANY's discovery of the false testimony, sham issues and sham pleadings, none of Adriana or the third party defendants

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[6] Thus rendering sham an argument relative to the sovereignty of nations as justification for his nonappearance for deposition, see Societe Nationale Industrielle Aerospatiale v. U.S. District Court, S.D. Iowa, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987).

had expressed anything other than satisfaction with LEWIS & COMPANY's services,[7] when it became apparent that LEWIS & COMPANY intended to disclose to the Ninth Circuit the fact of such false testimony, sham issues and sham pleadings, Adriana and the third party defendants, with only the reply briefs remaining to be filed in less than two weeks, (a) moved to substitute new counsel and (b) offered LEWIS & COMPANY an immediate $103,000 payment for LEWIS & COMPANY's legal services in this case only[8] and conditioned

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[7] Even after the entry of default by the district court, Adriana and the third party defendants and/or their related business interests requested LEWIS & COMPANY to serve as sole, lead counsel, or as co-counsel, in multiple matters of business litigation in at least five different states or jurisdictions around the country, as well as in Europe, including Rex Oil, Ltd., v. M/V Jacinth, 873 F.2d 82 (5th Cir. 1989), cert. denied, ___ U.S.___, 110 S.Ct. _____(1990).

[8] Adriana and/or related business interests renounced fee obligations for legal services in all other matters in which LEWIS & COMPANY was providing representation, and had failed to meet fee obligations to other counsel in such other cases.

payment on LEWIS & COMPANY's immediate substitution out of the case. The only reasonable interpretation of the timing of that offer was that it was a thinly-disguised attempt to buy LEWIS & COMPANY's silence. LEWIS & COMPANY rejected the offer and filed an opposition to the motion for substitution which disclosed, in a manner so as not to breach any attorney-client privileges, the fact of the false testimony, sham issues and sham pleadings, consistent with the obligations of counsel under McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988)[9] and Nix v.

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[9] "Although trial counsel may remain silent and force the prosecutor to prove every element of the offense, counsel for an appellant cannot serve the client's interest without asserting specific grounds for reversal. In so doing, however, the lawyer may not ignore his or her professional obligations. Neither paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law .... "
McCoy, 108 S.Ct. at 1900.

Whiteside, 475 U.S. 157, 166, 106 S.Ct. 988, 994, 89 L.Ed.2d 123 (1986).[10]

A total of eleven briefs were filed in connection with the motion for substitution; the issue was pending for seven months. See App. XII-XVII. Yet, startlingly, in all that time, neither new counsel for Adriana and the third party defendants nor any judge of the Ninth Circuit hearing the issue sought the basis for LEWIS & COMPANY's assertions as to the false testimony, sham issues, and sham pleadings. (While new counsel for Adriana and the third party defendants responded in each of four briefs to LEWIS & COMPANY's disclosures with unsupported vitriol, the reply brief ultimately filed

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10 "'No client, corporate or individual, however powerful ... is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law ... or disrespect of the judicial office ... He must observe and advise his client to observe the statute law." Nix, 475 U.S. at 166, 106 S.Ct. at 994.

by such counsel on behalf of Adriana and the third party defendants implicitly or explicitly conceded the truth of LEWIS & COMPANY's disclosures.) Instead, new counsel for Adriana and the third party defendants concocted a rationale to justify the substitution that despite the prior specific approval by Adriana and the third party defendants of the opening briefs, the most significant issues and where the material facts are undisputed, i.e., the requested recusal of Judge Real and the constitutional challenge to the appointment of Mr. Carroll as a denominated "master", were "offensive", "obnoxious and an affront to the court."

Following oral argument, see n.19, infra, the court issued an opinion dated September 10, 1990 which (a) affirmed all rulings of the district court with the exception of a ruling on damages for emotional distress and (b) imposed sanctions against LEWIS & COMPANY and Adriana

pursuant to Fed. R.App. 38, for filing opening briefs deemed "frivolous" on the basis that the arguments raised were "rehashings of the facts and present hardly any legal analysis". App. I at 37. Further, the court held it would award damages pursuant to 28 U.S.C. §1927 as a result of the opening briefs purportedly using "one-and-one half line spacing."

LEWIS & COMPANY timely filed a petition for rehearing and suggestion for hearing en banc by personally delivering on September 24, 1990 such document to the office of clerk of the U.S. District Court of the Northern District of California in San Francisco, California, pursuant to the specific instructions of a deputy clerk of the Ninth Circuit and specific representations that such clerk would personally insure that the document would be marked as received and filed on September 24, 1990, i.e., timely pursuant to Fed. R.App.

P. 40.[11] Nonetheless, by order dated November 16, 1990, the Ninth Circuit deemed LEWIS & COMPANY's petition "untimely", inaccurately suggesting the petition for rehearing and suggestion for hearing en banc was mailed, rather than personally delivered.[12] Also by the November 16, 1990 order, the court fixed attorney fees, double costs and damages jointly against LEWIS & COMPANY and Adriana in the amount

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[11] As a result of the October, 1989 San Francisco earthquake, the Ninth Circuit presently has no facilities to accept in-person filings; the court relies on the local district court clerk's office to receive hand-carried documents for processing and filing by the Ninth Circuit. Other deputy clerks of the Ninth Circuit have stated that, because of the lack of a regular intake window, it is the policy and practice of the court to mark petitions for rehearing as filed based upon the date of the proof of service.

[12] The November 16, 1990 order also held a petition for rehearing by Adriana and the third party defendants untimely on the same basis. A further motion/petition for relief by such parties states that new counsel likewise personally delivered the petition for rehearing to the clerk's office at the U.S. District Court in San Francisco, pursuant to the instructions of the same deputy clerk at the Ninth Circuit.

of $73,101.00.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE APPOINTMENT OF THE "MASTER" IS UNCONSTITUTIONAL AND CONTRARY TO STATUTE

Mr. Carroll's appointment as "master" runs inherently contrary to Article III and the due process clauses of the U.S. Constitution, and is contrary to statute and the Federal Rules of Civil Procedure for the following reasons:[13]

First, the appointment was not to a "special master" pursuant to Fed. R.Civ. P. 53, but was instead to a Local Rule 25.10 "master". The difference is more than that of semantics. The 1983 amendments to Fed. R.Civ. P. 53, in the context

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[13] LEWIS & COMPANY has standing to challenge the appointment of Mr. Carroll (a) under Kordich v. Marine Clerks Ass'n, 715 F.2d 1392 (9th Cir. 1983), where counsel is deemed the equivalent of a party for purposes of appeal, and (b) because both the district court and the Ninth Circuit premised the dismissal of the complaint and entry of default on discovery "rulings" by Mr. Carroll which were in turn premised on purported, but unspecified "conduct" by LEWIS & COMPANY.

of the Magistrates Act of 1978, 28 U.S.C. §631, et seq., makes plain that judicial, as opposed to fact-finding functions, of special masters have been removed.[14] In the context of Fed. R.Civ. P. 53, the appointment of private attorneys to serve in an ad hoc, judicial capacity is inconsistent with contemporary notions of Article III and due process requirements. Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 544 (9th Cir. 1984); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). Here, however, Mr. Carroll was appointed for the purely judicial function

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[14] The Advisory Committee Notes to the 1983 amendments state the term "Special Master" was retained "in order to maintain conformity with 28 U.S.C. §636(b)(2), authorizing a judge to designate a magistrate to serve as a special master .... " The Advisory Committee further remarked, "[a]lthough the existence may make the appointment of outside masters unnecessary in many instances ... such masters may prove useful when some special is desired or when a magistrate [is] unavailable for length and detailed supervision of a case."

of ruling on discovery and evidentiary matters "without motion".

Further, Mr. Carroll's compensation, at the rate of $235 per hour (in 1987) plus secretarial, paralegal, and associate time, was guaranteed by Judge Real's contempt authority, a result expressly prohibited by Fed. R.Civ. P. 53, which allows a special master to collect his fees only by writ of execution. 5A Moore's Federal Practice, para. 53.04[1] at 53-32.

Moreover, no showing of "exceptional circumstances", required by Fed. R.Civ. P. 53, was made here; rather, the stated reason for the appointment, "to insure the cooperation of counsel and the expeditious completion of discovery", would make references the rule, rather than the exception. Such a result squarely contradicts the holdings of this court and other circuits. For example, in LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309,

1 L.Ed.2d 290 (1957), this court found that the reference to a master in circumstances not shown to be exceptional "amounts to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." Id., 352 U.S. at 256, 77 S.Ct. at 313.[15]

Second, the appointment is not a reference to a full- or part-time U.S. Magistrate within the procedures and standards prescribed by the Magistrates Act, and lacks legislative limits of

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[15] The Tenth Circuit specifically rejected the appointment of a special master to supervise interrogatory answers, holding:

> "The court has control over and responsibility for the discovery procedures authorized by the rules. The order of reference here borders on an abdication of judicial function and is not justified by the record."

Wilver v. Fisher, 387 F.2d 66, 69 (10th Cir. 1967). Likewise, in Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089 (3d Cir. 1987), the Third Circuit rejected the reference of a contempt motion involving "relatively simple questions of fact and law" as "offending Rule 53". Id., 818 F.2d at 1096-97.

compensation and constitutional limits of impeachment. Specifically, the Magistrates Act permits magistrates to hear and determine pretrial matters, including discovery matters, 28 U.S.C. §636(b)(1)(A), or, upon proper designation by a district judge, to serve as a special master, 28 U.S.C. §636(b)(2), or to perform such additional duties, not inconsistent with the constitution and federal laws, as are assigned by district judges. 28 U.S.C. §636(b)(3). See U.S. v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Thus, magisterial functions of hearing discovery matters and acting as a special master are mutually exclusive and a non-magistrate may not perform the judicial function of overseeing discovery. Magistrates are appointed or removed by concurrence of a majority of the judges of the district courts and pursuant to standards set by statute and procedures promulgated by the

Judicial Conference. 28 U.S.C. §631; Raúdatz, 447 U.S. at 685, 100 S.Ct. at 2417 (Blackmun, J., concurring). Part-time magistrates who do not meet the statutory standards of 28 U.S.C. §631 may be appointed only certification by the appointing courts that no qualified individual is available in the district. 28 U.S.C. §631(b), (c). Tenure is fixed by statute, 28 U.S.C. §631(e); the compensation of magistrates, part- and full-time, is circumscribed to a portion of that of district judges.

Here, by contrast, although performing the duties of a magistrate and more, Mr. Carroll is appointed at the whim of a single judge, without set standards, other than an existent relationship between him and Judge Real. Further, the parties are made to pay Mr. Carroll's uncircumscribed, approximately $750,000 annual salary. Query: is there some reason, other than $750,000 annual compen-

sation for Mr. Carroll to be a "master", rather than a part-time magistrate? See discussion infra, re: disqualification.

Third, the appointment is not governed by any established procedures for hearing and review by an Article III judge. Neither Local Rule 25.10 nor the appointing order prescribes any procedures by which the "master" is to hear and determine discovery matters, much less any procedures for review. Indeed, the appointing order, by providing for discovery matters to be resolved "without motion", as well as the manner in which proceedings before Mr. Carroll were generally conducted, i.e., by letter or telephone, there was not even opportunity to make a record for district court or appellate review.[16]

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[16] LEWIS & COMPANY requested telephone "hearings" before Mr. Carroll be transcribed or tape-recorded. Exh. "25" to CR 121. While Mr. Carroll represented that some of the conversations were tape-recorded, those tapes were at no time made available for district court or appellate review.

Instead, information relative to proceedings before Mr. Carroll was communicated informally by Mr. Carroll to Judge Real, without the presence, objections, or briefs of the parties.[17] In this context, Mr. Carroll made an ex parte, extrajudicial settlement overture to LEWIS & COMPANY -- coercive and on terms that could only have been favorable to Thoeren, because a purported motion for contempt was then pending against LEWIS & COMPANY and Adriana -- on the representations (a) Mr. Carroll was vested with authority by

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[17] For example: (a) in the face of Midgen's invocation of the attorney-client privilege during deposition, Mr. Carroll announced that he would "seek the advice" of Judge Real as to how to proceed. Tr. 6/24/87, Exh. "25" to CR 124 at 147:1-17; (b) during the hearing on Adriana's motion to vacate the reference, Judge Real concluded, without benefit of a motion or other record, that LEWIS & COMPANY was "stonewalling" on discovery, RT 8/10/87 at 29:13-30:2; and (c) Judge Real was somehow aware, without any order or report by Mr. Carroll, and without any formal motion pending, that Zade and Kunz had been directed in June, 1987 by Mr. Carroll to appear for deposition in July, 1987.

Judge Real to initiate and conduct settlement discussions pursuant to his appointment, (b) review of the pleadings led him and, plainly, Judge Real, to the opinion that discovery costs would exceed the amount at issue in the litigation, and (c) the existence and content of the conversation would not be revealed to Thoeren or his counsel unless all parties agreed to discuss settlement.

The appointment is a simultaneous abdication and expansion of Article III authority: Judge Real conferred on a private citizen the authority of an Article III judicial officer, thus abdicating his own duties; yet at the same time expanded his own authority by creating a rump judiciary in which he performs both executive and legislative functions, i.e., to "nominate and confirm" persons to exercise the authority of a U.S. district judge without an established right of or procedure for Article III review.

Moreover, the appointment carries with it the appearance of financial venality and corruption and is a vehicle by which the district judge sought to implement his biases and preconceived notions for a predetermined result: both Mr. Carroll and Judge Real resisted requests and opportunity for disclosure of prior similar appointments and Mr. Carroll's total compensation. Tr. 5/5/87 at 83:12-84:1, Exh. "D" to CR 62; RT 11:13-12:24. See International Union (UAW) v. N.L.R.B., 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him"). Mr. Carroll did, however, reveal off-the-record that, as of 1987, he had been acting as a denominated special master for the preceding 10 years; it was also apparent that his practice is devoted almost exclusively to such appointments,

such that the total compensation to Mr. Carroll, over the course of the approximately 13 years that this practice has continued, is $10 million in current cash value, including compensation for his associate/daughter, paralegal, and secretary, monies guaranteed by Judge Real's contempt authority.

Query: can any person, by proxy, exercise the authority of a federal judge if Judge Real so decides? Can the justices of this court assign their authority by proxy? For huge compensation compelled by litigants on pain of contempt? Will this court allow a district judge to suspend the Federal Rules of Civil Procedure? To exercise legislative and executive authority that operates outside the boundaries of Article III, statute, and the federal rules? Will this court tolerate a federal judge engaging in ex parte communications with a party who was facing sanctions and contempt? Making rulings

"without motion" and without a record? To ask these questions is to answer them.

Whether Judge Real has financially benefitted from this 13-year practice is a question open for formal investigation, but the appearance and inferences of such impropriety are plain. See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Such a result is not only intolerable, unconstitutional and unjustified, but is inherently corrupt and corrupting of the court and counsel who "go along" with the practice.

The Ninth Circuit, in an opinion startling for containing no less than 75 significant misstatements and/or misrepresentations of the appellate briefs and/or the court record, principally intended to undermine LEWIS & COMPANY's credibility and to conceal from public view the existence of the long-standing practice by which Judge Real has delegated his

judicial authority and enriched his long-time friend, ignored or overlooked the unconstitutionality, statutory violations, and corrupt nature of the practice.

Specifically, the opinion holds merely that Adriana's objection to Mr. Carroll's appointment was "waived" because Adriana's motion to withdraw the reference was not filed until July 6, 1987, App. I at __, failing to address (a) that as the appointment was not under Fed. R.Civ. P. 53 and was without constitutional basis, the issue could not be "waived", Pacemaker Diagnostic Clinic v. Instromedix, 712 F.2d 1305 (9th Cir. 1983); (b) Adriana sought relief from the Ninth Circuit on May 6, 1987 for, among other things, the appointment and conduct of Mr. Carroll, 9th Cir. Civ. Dkt. No. 87-5781;[18] (c) during May, 1987, Mr. Carroll made his ex parte,

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[18] One judge on the motions panel voted for an interim stay of the entire proceedings in the district court.

extra-judicial settlement overture to LEWIS & COMPANY, and (d) illness and injuries to Mr. Lewis which largely kept him out of the office from December, 1986 through August, 1987, Exhs. "7"-"9" to CR 125.[19]

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[19] It is difficult to reconcile such a holding with that of Alaniz v. Cal. Processors, 690 F.2d 717 (9th Cir. 1982), in which Judge Alarcon participated, and where the purported authority of a magistrate to act without a "specific, clear and unambiguous expression of consent" was soundly renounced. In a footnote, the court quoted 28 U.S.C. §636(c)(2): "neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent ... [W]e will not permit our jurisdiction to depend on inferences when both the statute and common sense call for precision." Id.

LEWIS & COMPANY brought Alaniz to the panel's attention just prior to oral argument; immediately thereafter, the panel suddenly changed the rules and limited LEWIS & COMPANY to less than 10 minutes of oral argument. The panel cut off LEWIS & COMPANY's argument at the precise moment Alaniz was raised and permitted LEWIS & COMPANY no further participation, although it was plain that LEWIS & COMPANY was the only counsel present with a full grasp of the facts and issues. It is well-known in the Los Angeles legal community that Judges Real and Alarcon are close friends.

II. THE ASSIGNED TRIAL JUDGE SHOULD HAVE BEEN DISQUALIFIED[20]

28 U.S.C. §144, allowing for the disqualification of a district judge upon the filing of an affidavit by a party, "is plain in its terms and imperative in its construction." Nations v. United States, 14 F.2d 507, 509 (8th Cir. 1926).[21]

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[20] Under Kordich, 715 F.2d 1392, the Ninth Circuit equates LEWIS & COMPANY with the parties for the purpose of review. Moreover, if Judge Real were disqualified, all orders, including those directed against LEWIS & COMPANY, would be vacated. Accordingly, LEWIS & COMPANY has standing on the issue of Judge Real's requested disqualification pursuant to 28 U.S.C. §144 and 28 U.S.C. §455.

[21] "There is no ambiguity ... nothing to qualify or temper its words or effect ... It permits an affidavit of personal bias or prejudice to be filed and ... if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another."
Berger v. United States, 255 U.S. 22, 33, 41 S.Ct. 230, 233, 65 L.Ed. 488 (1921).
28 U.S.C. §144 serves a salutary purpose:

An affidavit, to be "legally sufficient", must specifically allege facts "that fairly support the contention that the judge exhibits bias or prejudice directed toward a party that stems from an extrajudicial source." U.S. v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980).

Here, the affidavit filed by Adriana was legally sufficient, alleging: (a) extra-judicial proceedings and bias, (b) that the appointment of Mr. Carroll carried with it the appearance of impropriety, including long-time personal and financial relationships arising therefrom, (c) extra-judicial communications among Judge Real, Mr. Carroll, and counsel. Such allegations squarely met the test that bias and prejudice exhibited by a

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"[I]ts solicitude is that the tribunals of the country shall not only be impartial ... but shall give assurance that they are impartial, free ... from any 'bias or prejudice' that might disturb the normal course of impartial judgment .... " Berger, 255 U.S. at 35-36, 41 S.Ct. at 234.

judge "stems from from an extrajudicial source." Sibla, 624 F.2d at 868; Peacock Records, Inc. v. Checker Records, Inc., 430 F.2d 85, 89 (7th Cir. 1970) (findings unsupported by the record are evidence that the judge relied on extra-judicial sources).

The Hon. William J. Rea, to whom the motion was assigned,[22] ruled the

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[22] Contrary to the requirement of Section 144 that "where an affidavit of personal bias or prejudice is filed, the judge must cease to act in the case and proceed to determine the legal sufficiency of the affidavit", Bell v. Chandler, 569 F.2d 556, 559 (10th Cir. 1978), citing Berger, the affidavit was assigned to another district judge, the Hon. William J. Rea, for determination of its legal sufficiency pursuant to a Central District General Order.

Such assignment misreads the statutory provisions. Section 144 applies to "any proceeding" in a district court; upon the presentation of a legally sufficient affidavit, the inquiry ends and the entire case ("proceeding") is reassigned to another judge. Although assignment to another judge of a disqualification motion for determination of the sufficiency of the affidavit has on occasion been permitted, see, e.g., U.S. v. Grinnell Corp., 384 U.S. 563, 582-83 n.13, 86 S.Ct. 1698, 1709-10, n.13, 16 L.Ed.2d 778 (1966), it has been severely criticized. See U.S. v. Azhocar, 581 F.2d 735, 738 (9th Cir. 1978).

affidavit was evidentiarily infirm as having been made on "information and belief", and determined a declaration from Thoeren's counsel, CR 66, because it was purportedly based on personal knowledge, was inherently more credible than the moving affidavit. Such a ruling (a) defies the mandate of 28 U.S.C. §144 that legal sufficiency is to be determined from the four corners of the affidavit alone, Berger, and (b) ignores the requirement of the statute that a party to a proceeding make the required affidavit -- an affidavit by counsel is automatic grounds for denial of the motion, Giebe v. Pence, 431 F.2d 942 (9th Cir. 1970) -- such that affidavits may be made on information and belief. Berger, 255 U.S. at 34, 41 S.Ct. at 233; U.S. v. Zagari, 419 F. Supp. 494, 504 n.29 (N.D. Cal. 1976).

Alternatively, Judge Real should have been disqualified under 28 U.S.C. §455(a) for the appearance of bias or partiality,

see RT 3/16/87 at 15:25-16:8, or under 28 U.S.C. §455(b), prohibiting judges from hearing a case in which they have a financial interest. Specifically, the appointment of Mr. Carroll as a denominated "master" smacks of financial interest where a federal judge who, at the time, received an annual salary limited by statute to $89,500 appoints, in derogation of Article III, the Magistrates Act, and Fed. R.Civ. P. 53, a long-time friend to act as his "deputy" in ruling on and carrying out pretrial orders and whose services are compensated by the parties at an annual rate, including support staff and associate compensation at an annual rate of approximately $750,000, then refuses to disclose the nature and number of such appointments, gives at least the appearance that Judge Real is receiving some benefit in exchange. That mere appearance is sufficient to require recusal. See Liljeberg, 108 S.Ct. at 2202.

Moreover, it is undisputed that ex parte and extrajudicial communications took place, including, inter alia, Mr. Carroll's ex parte settlement overture to LEWIS & COMPANY based on the representation of his authority from Judge Real -- not set forth in any written document -- to initiate and conduct settlement discussions. Exh. "C" to CR 65. See also n.17, supra.[23]

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[23] The Ninth Circuit's opinion characterizes LEWIS & COMPANY as having argued that "sanctions were improper because Judge Real should have been disqualified because of ex parte communications with the special master", and that such argument was "not presented in the opening brief". App. I at 34. Such holding not only ignores and/or overlooks actual arguments made in the opening brief of Adriana that Judge Real should have been disqualified for his ex parte and extra-judicial communications with Mr. Carroll and for the appearance of a financial interest, Supp. App., Adr Br., but fails to heed the mandate of Liljeberg, 108 S.Ct. at 2206-07, that all orders from the moment of Mr. Carroll's appointment must be declared void and that the appearances of impropriety can be raised at any time.

The opinion further holds that LEWIS & COMPANY "offers no objective proof" of a "financially beneficial relationship" sufficient for disqualification under 28 U.S.C. §455(a) (the opinion does not address 28 U.S.C. §455(b)). Not only does that holding

III. THE NINTH CIRCUIT IGNORED COUNSEL'S DUTIES MANDATED BY THIS COURT

The opinion gives short shrift to LEWIS & COMPANY's arguments that the substitution of counsel by Adriana and the third party defendants was done for an improper purpose, noting only that LEWIS & COMPANY was "fired" during the course of the appeal, App. I at 2, and dismissing LEWIS & COMPANY's arguments thereon as "irrelevant". Id. at 32 n.11.

At the crux of this issue, however, is that Adriana and the third party defendants, having learned that LEWIS & COMPANY had discovered, after the submission of the opening briefs herein, of the false testimony, sham issues, and sham pleadings sought to be perpetuated by them, and that

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misstate Liljeberg, 108 S.Ct. at 202, but overlooks (a) undisputed facts in the record demonstrating the appearance of bias and impropriety and inferences therefrom, see discussion, supra, and (b) the fact of approximately $10 million changing hands over 13 years.

LEWIS & COMPANY was prepared to disclose the fact and nature of same to the Ninth Circuit, sought to use their purported right to substitute counsel for the purpose of preventing those disclosures. See McCoy, 108 S.Ct. at 1900; Nix, 475 U.S. at 166, 106 S.Ct. at 994, see nn. 9-10, supra, see also Golden Eagle Distributing Corp. v. Burroughs Corp., 809 F.2d 584, 589 (9th Cir. 1987) (9th Cir. 1987) (Noonan J., dissenting from denial of sua sponte request for en banc hearing)[24].

Presented here are two substantive issues which should be of critical concern to this court as a matter of policy for every court in the United States: (1) whether parties may present and attempt to perpetuate false testimony, sham issues

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[24] "A client has as little right to the presentation of false arguments as he has to the presentation of false testimony. No conflict exists when a lawyer confines his advocacy by his duty to the court." Id., 809 F.2d at 589.

and sham pleadings and use their right of substitution to escape the consequences of such false testimony, sham issues and sham pleadings; and (2) whether a party, upon knowledge that his counsel has learned and intends to disclose that such parties have submitted false evidence, sham issues, and sham pleadings, can exercise his right to counsel by requiring the removal of his disclosing counsel and the substitution of new, acquiescent counsel before disclosing counsel can formally present to the appellate court the nature of the false testimony, sham issues and sham pleadings.

The Ninth Circuit not only failed to address how this court's mandated ethical obligations, as expressed in Nix and McCoy, are to be effectuated, but functionally precluded LEWIS & COMPANY from making its disclosures. As a consequence, LEWIS & COMPANY, a small practice consisting of two lawyers, at great financial and professional sacrifice, rejected an

offer of $103,000, plainly intended to buy their silence, for the apparent privilege of begging the Ninth Circuit for the opportunity to tell the truth and to perform a lawyer's obligations.

In so doing, the Ninth Circuit left open a series of troubling questions, never previously addressed by this court or any other federal appellate court: what are the role and obligations of counsel to comply with the mandate of Nix and McCoy and to disclose the attempted perpetuation of false testimony before an appellate court? If LEWIS & COMPANY had not disclosed the false testimony, sham issues and sham pleadings, what risk would it have faced for having submitted the opening briefs? Should LEWIS & COMPANY have taken Adriana's money and knowingly allowed the Ninth Circuit to rely on a record which is not truthful or accurate? How is a disclosure consistent with Nix and McCoy to be made? Should the disclos-

ure be presented by way of conclusions, as here, or by describing the particularity the underlying factual premises of those conclusions, even at the risk of divulging attorney client information? Should be disclosures be presented in camera or for other parties to the appeal to see?

If meaning and effect are to be given to this court's mandate in Nix and McCoy and the public policy expressed thereby, these issues must be addressed now. To do otherwise, this court will allow to stand as precedent the policy de facto established by the Ninth Circuit that lawyers who comply with their ethical obligations of truthful advocacy and reject transparent bribes intended to prevent an appellate court from considering a truthful and accurate record, will not only not be accorded appropriate consideration, but will be made to suffer professionally and financially. Moreover, by such inaction, this court, as has the Ninth Circuit, will

send the unmistakable message to the legal community and to the public that lawyers who ignore their ethical obligations will be financially rewarded, professionally successful, and thus be those who regularly appear before the federal appellate courts and this court.

IV. THE NINTH CIRCUIT'S IMPOSITION OF SANCTIONS AGAINST PETITIONERS REPRESENTS A GROSS DEPARTURE FROM JUDICIAL STANDARDS

The Ninth Circuit's holding that the opening briefs were "frivolous" and that arguments raised are "rehashings of the facts and present hardly any legal analysis, App. I at 37, ignores the extensive (425) and appropriate citations to authority, as well as legal reasoning and presentation. See Supp. App. It is odd that briefs prepared by three lawyers, including graduates of Yale, Duke, and Columbia law schools, are now termed "frivolous".[25] How is it that these

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[25] Involved in preparing the briefs were (a)

skills are suddenly lost in this one case?

The opinion of the Ninth Circuit, riddled as it is with misstatements and misrepresentations of the opening briefs and the record, is fundamentally premised on unsupported conclusions. For example, the opinion is founded principally on a pretext of purported discovery violations by LEWIS & COMPANY, ignoring the record reflecting that no discovery motion was ever filed, and no signed discovery request ever propounded. The opinion likewise ignores evidence in the record

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Mr. Lewis, who has had approximately 30 record verdicts, settlements, and precedent-setting decisions on state and/or national levels during his 17-year career, including real property, banking, worker's compensation, child custody, and admiralty, (b) Neal P. Rutledge, informal of counsel to LEWIS & COMPANY, son of the late Justice Wylie Rutledge, formerly Duke University professor of trial practice, and whose career includes representing the Speaker of the U.S. House of Representatives before this court, and (c) Amy J. Cassedy, a 1985 law graduate of Columbia, a top-level, published editor at the Colum. J.Art & the Law, and a magna cum laude graduate of the University of Pennsylvania.

that despite the lack of a signed discovery request,[26] Adriana, through LEWIS & COMPANY,[27] produced all nonprivileged documents in its possession, and assisted in the production of documents in the possession of Adriana's former accountants.[28]

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[26] The opinion states that Adriana "offers no authority to support its argument that an "unsigned copy"of a discovery request is "ineffective and can be ignored", failing to make any mention of Fed. R.Civ. P. 26(g) or of Central District Local Rule 8.3, which prohibits the filing of discovery requests until such requests are at issue. If the discovery document served on counsel is not the operative document, Fed. R.Civ. P. 26(g) is read out of existence.

[27] The opinion does not explain why LEWIS & COMPANY is accountable for Adriana's document production. At the same time, however, the Ninth Circuit precluded LEWIS & COMPANY from opportunity to respond on such issues.

[28] Specifically, (a) pursuant to a sua sponte bench order by the district court, without notice, calling for the production of documents within one hour, Adriana produced hundreds of documents, RT 3/3/87 at 11-13, Exhs. "4"-"6" to CR 121, (b) Adriana produced additional documents pursuant to a telephone conference (without a formal motion, procedures, or record), in which Mr. Carroll, while threatening contempt, "clarified" certain incomprehensible categories from Thoeren's unsigned request and "ordered" production on approximately one business day's notice, Exhs.

Likewise, the opinion states that appellants raised Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1134, 1342 (9th Cir. 1985), "for the first time in its reply brief", i.e., by substituted counsel, App. I at 24, ignoring 11 citations to Fjelstad in the opening brief of Zade, Kunz, and Midgen, including for the proposition that discovery sanctions must be "specifically related to the particular claim at issue in the discovery order", 762 F.2d at 1342, i.e., the same holding the opinion states was not raised. Supp. App., Op. Br. Zade, et al. at 2.[29]

"9", "12"-"14" to CR 121, (c) Adriana produced "source" financial documents, although Thoeren's unsigned request did not call for same, Exhs. "16", "21" to CR 121, and (d) LEWIS & COMPANY arranged, for Mr. Carroll's convenience, to copy approximately 3,000 pages produced under subpoena by Adriana's former accountant. Exh. "29" to CR 121, Exhs. "A", "C" to CR 191.

[29] The record also fails to support statements in the opinion that Adriana "repeatedly" failed to appear at "scheduled" depositions. In fact, (a) Midgen appeared and testified at deposition, Exh. "25" to CR 124, (b) Adriana's local officer testified on four occasions, see, e.g., Exh. "4" to CR 121, (c)

Similarly, the opinion holds that a motion to reconsider the amended judgment was filed "after the ten day limit to file such motions ... had expired", App. I at 35, squarely overlooking Fed. R.Civ. P. 6(a) ("[w]hen the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation").[30]

Further, the court agreed with the position asserted in the opening briefs that damages for emotional distress are not available on a judgment for fraud. If the opening briefs were "frivolous", how was that argument sustained?[31]

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and Kunz and Zade were in Los Angeles during June, 1987 to be deposed, but counsel for Thoeren refused to go forward. CR 121.

[30] The amended judgment was entered April 29, 1988; the motion for reconsideration was filed ten court days later, May 13, 1988.

[31] Moreover, the Ninth Circuit held that new counsel for Adriana "substantially improve" the arguments of the opening briefs, App. at 38; however, new counsel in their reply brief and/or during oral argument, adopted most of

Finally, the award of damages pursuant to 28 U.S.C. §1927 as a result of the briefs purporting using "one-and-one half line spacing", App. I at 38, (a) squarely contradicts the Ninth Circuit's August 29, 1989 order expressly approving the form and spacing of the opening briefs, (b) fails to make any finding of "intent, recklessness or bad faith" to support the imposition of excess attorney fees under 28 U.S.C. §1927, see, e.g., Barnd v. City of Tacoma, 664 F.2d 1339 (9th Cir. 1982), and (c) fails to consider the fundamental precept that "only authorizes the taxing of excess costs arising from an attorney's unreasonable and vexatious conduct .... " U.S. v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983).

To say that awarding attorney fees and double costs pursuant to Fed. R.App.

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the arguments raised in the opening briefs, despite purporting to "abandon" issues raised in the opening briefs.

P. 38 and damages pursuant to 28 U.S.C. §1927 is inappropriate and violative of fundamental due process considerations in light of the serious constitutional issues raised, as well as LEWIS & COMPANY's reliance on the Ninth Circuit's own prior order for the form of the briefs, is an understatement. See Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986) (petition for certiorari not "frivolous" where raising direct conflict between circuits over interpretation of rules of appellate procedure).

V. THE NINTH CIRCUIT IMPROPERLY AFFIRMED DISTRICT COURT SANCTIONS VIOLATIVE OF DUE PROCESS AND ESTABLISHED STANDARDS

A. Motion for Reconsideration

The district court imposed sanctions against LEWIS & COMPANY, Adriana and the third party defendants for the filing of the motion to reconsider the amended

judgment of April 29, 1988.[32] While the court's original judgment entered April 13, 1988 found no liability against Midgen or AFP, Thoeren filed a document styled "Application to Correct or Modify Judgment", CR 174, seeking under Fed. R.Civ. P. Rules 59(e) and 60(a) to include findings of liability against Midgen and AFP, as well as to find additional damages against Zade. A bare eight days later, in contravention of local notice and hearing requirements, and without providing any opportunity for opposition, the district court granted Thoeren's "application".

By the district court so amending the judgment, not only did the district court violate fundamental notions of due pro-

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[32] The amended judgment was prepared by counsel for Thoeren pursuant to a practice that, although made part of the local rules of the Central District of California, has been specifically disapproved by the Ninth Circuit. See Cher v. Forum International, Ltd., 692 F.2d 634, 637 (9th Cir. 1982), noting the "regrettable practice" of permitting the winning lawyers to draw findings of fact, giving such findings "special scrutiny".

cess, but a motion for reconsideration of the amended judgment was (a) appropriate and (b) not sanctionable conduct.[33] 6A Moore's Federal Practice, para. 59.13[4] at 59-302, 303.[34]

B. Motion to Disqualify Counsel

The district court also sanctioned LEWIS & COMPANY and Adriana for having brought a motion to disqualify counsel for Thoeren. Such motion was based upon undisputed evidence that counsel for Thoeren (a) acted as secretary for and performed services for Adriana in matters substantially related to this litigation, see Evans v. Artek Systems Corp., 715 F.2d 788, 792 (2d Cir. 1983), Global Van Lines

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[33] This issue was sufficiently important that it was one of only two issues raised by Adriana and the third party defendants in their appellate petition for rehearing.

[34] Moreover, the "application" was unsupported by either Fed. R.Civ. P. 59(e) (to correct "deliberative errors", see Scola v. Boat Frances R., Inc., 618 F.2d 147, 152 (1st Cir. 1980), or Fed. R.Civ. P. 60(a) (to correct clerical, "ministerial", or "inadvertent" errors, Scola, 618 F.2d at 152).

v. Superior Court, 144 Cal.App.3d 490, 192 Cal.Rptr. 609 (1983), (b) acted as negotiator for Thoeren and Adriana, Civil Service Comm., 163 Cal.App.3d at 81, 209 Cal.Rptr. at 167, (c) witnessed events critical to this litigation, Comden v. Superior Court, 20 Cal.3d 906, 912, 145 Cal.Rptr. 9, 546 P.2d 971 (1987); Lyle v. Superior Court, 122 Cal.App.3d 470, 482, 174 Cal.Rptr. 918, 926 (1981), and (d) withheld mail belonging to Adriana, thus plainly holding itself out as counsel for Adriana. Emle Industries, 478 F.2d at 571.[35]

Had Adriana not withdrawn the issue of the disqualification of counsel on its reply brief, the district court's denial of the motion should have been reversed. Under any circumstance, however, the

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[35] Despite this evidence in the record, the Ninth Circuit nonetheless held that "Lewis offered no facts" showing an attorney-client relationship between Thoeren's counsel and Adriana. App. I at 34.

arguments presented in the motion were "well-grounded in fact and ... warranted by existing law." Fed. R.Civ. P. 11; see also Cal. Archit. Bldg. Prod. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1472 (9th Cir. 1987). Nor was the motion "interposed for any improper purpose", Fed. R.Civ. P. 11; indeed, Adriana, through LEWIS & COMPANY, brought the motion on shortened time so as to minimize (a) prejudice to Thoeren should he need to seek new counsel and (b) delay in discovery proceedings. CR 16; Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 87 (9th Cir. 1983).[36]

C. Sanctions for Deposition

As part of the award of sanctions for

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[36] Additionally, the award was infirm for the failure of notice and opportunity to be heard, see Tom Growney Equip. v. Shelley Irrig. Devel., 834 F.2d 833, 835 (9th Cir. 1987), and for awarding a lump sum amount reflecting all attorney time incurred by Thoeren's counsel since the inception of the litigation. See In re Matter of Yagman, 796 F.2d 1165, 1184-85 (9th Cir. 1986) as amended, 803 F.2d 1085.

the motion for disqualification, the district court imposed and the Ninth Circuit affirmed without comment sanctions for purported "obstructionist conduct" at the deposition of Adriana's custodian of records. That ruling fails (a) for lack of notice and opportunity to be heard, Tom Growney Equip. v. Shelley Irrig. Devel., 834 F.2d 833, 835 (9th Cir. 1987), (b) lack of specification as to what objections, if any, were purportedly offending, see Fjelstad, 762 F.2d 1334, and (c) being a lump sum award without allocation to any purportedly offending conduct, see In re Matter of Yagman, 796 F.2d 1165, 1184-85 (9th Cir. 1986), as amended, 803 F.2d 1085.

D. Local Rule Sanctions

Central District Local Rule 6.2 requires the parties to submit a joint report following a meeting at the commencement of the litigation, setting forth approximately six nonargumentative items

of information. LEWIS & COMPANY proposed two different reports, each setting forth the required information. Counsel for Thoeren, however, proposed a series of reports containing false, self-serving, and prejudicial information extraneous to the local rule. Consistent with Fed. R.Civ. P. 11, LEWIS & COMPANY declined to sign such documents; nonetheless, the district court imposed a sanction of $990 against LEWIS & COMPANY and Adriana. See Societe International Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) (complying with one obligation cannot form the basis for punishing the violation of another, conflicting obligation).

E. Contempt Finding

By order dated June 4, 1987, and affirmed by the Ninth Circuit, the district court held LEWIS & COMPANY and Adriana in contempt for "refus[ing]" to

pay the sanctions for the motion to disqualify counsel and the purported local rule violation "forthwith" from the court's oral orders of March 16, 1987 and March 24, 1987 and written orders of March 31, 1987 CR 58. Fairly read, that order holds that when LEWIS & COMPANY was immediately in contempt when it did not tender a total of nearly $6,000 in the courtroom immediately upon the announcement of each award of sanctions, notwithstanding that the court announced that written orders on each award of sanctions were forthcoming and that the written orders were not in fact entered until March 31, 1987, one and two weeks, respectively, following the oral announcement of the sanctions orders.

Moreover, the purported motion for contempt (a) was brought prematurely, i.e., before the March 31, 1987 orders became final pursuant to Fed. R.Civ. P. 59(e), (b) was brought despite any specified time for compliance, other than the

undefined "forthwith", (c) was rejected by the clerk of the court for failure to include a memorandum of points and authorities, a defect that was never corrected, such that LEWIS & COMPANY was held in contempt based on neither a properly pending motion nor an order to show cause.

E. Kordich Should Be Overruled

That the interests of lawyer and client are not synonymous, as required under Kordich v. Marine Clerks Ass'n, 715 F.2d 1392 (9th Cir. 1983), is never demonstrated more clearly than in this case. Here, the clients claimed an absolute right to substitute new counsel for the improper purpose of perpetuating false testimony, concealing false issues, and raising new false issues, including issues which positioned the parties against their former counsel. Accordingly, to assume a concurrence of interests between counsel and client, as in Kordich, is not only

unfair, but inherently and invidiously discriminatory and violative of fundamental notions of due process. U.S. Const. amends. V and XIV.

The original imposition of sanctions against LEWIS & COMPANY is now almost four years old. Reversal alone does not make the lawyer whole. F.D.I.C. v. Tefken Const. and Inst. Co., 847 F.2d 440 (7th Cir. 1987) (a lawyer's "bread and butter", his or her "reputation for integrity, thoroughness and competence"). To carry the mark that this case presents is itself damaging in maintaining or broadening a client base. Whatever purpose is served by Fed. R.Civ. P. 11 or other sanctioning process, that purpose must be juxtaposed against the continuing deleterious effect on the practice of law and the quality of justice when fear and improper coercion dominate a judicial proceeding. Accordingly, this court should establish procedures which allow for either the immediate

stay of all effect or immediate review of any summary adjudication in the nature of a sanction.

CONCLUSIONS

From the beginning, this litigation has been a charade passing for justice. LEWIS & COMPANY posed to the Ninth Circuit the scenario presented above, namely, if this court permits the sort of justice meted out by the district court and the Ninth Circuit and the conduct by Adriana and its successor counsel, the only successful lawyers and thus those who will appear before this and federal appellate courts, will be limited to those who ignore their ethical obligations as officers of the court. The Ninth Circuit has made plain its preference.[37] Lay people,

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[37] By this petition, LEWIS & COMPANY does not mean to impugn every judge of the Ninth Circuit. However, it is not clear whether LEWIS & COMPANY's petition for rehearing and suggestion for hearing en banc was distributed to all the judges of the Ninth Circuit. (The order denying as untimely the petition does not, contrary to usual practice, disclose a vote.) It would be startling and frightening

lawyers from areas outside the Ninth Circuit understand -- and are astonished and appalled by -- the corruption inherent in Judge Real's practice of appointing his long-time friend as a surrogate judicial officer. No immense number of words, no Alice in Wonderland opinion can change the facts. LEWIS & COMPANY, for one, will not bury its head in the sand, pretend what is up is down, what is corrupt is acceptable.

LEWIS & COMPANY's statement to the Ninth Circuit bears repeating here:

> "Where is the danger? Mr. Lewis carries no weapon; he is not part of a 100-lawyer firm representing institutional clients ... Where is the danger? In words that speak the truth? In words that challenge

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indeed if no judge voted to rehear the case or had the courage to dissent from a decision not to rehear the case en banc.

"authority"? To challenge authority is the only true or effective exercise of the mind. From Shakespeare to Shelly, from Disraeli to Silone, and, most recently, to Walesa and Havel, the tax of freedom is to continually challenge Authority and require its moral justification."

Lewis Rpl. at 19.

Wherefore, LEWIS & COMPANY respectfully requests that this court grant the within petition for writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit.

Dated: December 10, 1990

Respectfully submitted,

LEWIS & COMPANY

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